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Supreme Court, U.S.
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No. 08-552

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In The

Supreme Court of the United States

IBRAHIM ALI,

Petitioner,

v.

MICHAEL MUKASEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STANLEY J. HORN*
LAUREEN ANDERSON
HORN, KHALAF, ABUZIR, MITCHELL & SCHMIDT
2 North LaSalle Street
Suite 630
Chicago, IL 60602
312-281-5444

Counsel for Petitioner Ibrahim Ali

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The decision in *Chevron v. Natural Resources Defense Council,* 467 U.S. 278 (1984) charted a course of deference to regulatory agencies. If congressional intent is clear then a court is to give that intent authority, but if congressional intent is ambiguous then the court is to defer to the regulatory agency's reasonable interpretation of the meaning of a particular statute. Additionally, deference must be granted to regulatory agencies in how they reach such conclusions.

In particular, the Board of Immigration Appeals has been granted a great amount of deference to utilize a categorical and modified categorical approach to determine if an immigrant has committed a crime involving moral turpitude making them removable under the Immigration and Nationality Act (INA). In the instant case the BIA abandoned its own precedent of applying a categorical or modified categorical approach; furthermore the Seventh Circuit failed to give appropriate deference to the well-settled standards the BIA applies in reaching such questions, thereby creating confusion as to what standards must be followed.

The question presented is twofold: 1) What level of deference must be granted to the BIA when defining a crime involving moral turpitude when it deviates from its own well-settled analysis?; 2) What documents or evidence can the BIA turn to when determining a crime involving moral turpitude, whether it can look to the elements and nature of the offense of conviction or rather must it be the particular facts relating to the crime?

LIST OF PARTIES

All parties in the proceedings below are listed in the caption to this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and not a corporation.

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I. OPINION BELOW

The opinion of the court of appeals is reported at 521 F.3d 737 (7th Cir. Apr. 4, 2008) (No. 07-1970). The petition for rehearing and the final Board of Immigration Appeal and Judge's decision are unreported.

II. JURISDICTION

The judgment of the court of appeals was entered on April 4, 2008. The jurisdiction of the Court is invoked under 28 U.S.C. §2350(a).

III. STATUTORY PROVISION INVOLVED

8 U.S.C. §1227(a)(2)(A)(i), INA §237(a)(2)(A)(i) is labeled crimes of moral turpitude and provides that an alien is removable from the United States if he or she:

> (I) Is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and
>
> (II) Is convicted of a crime for which a sentence of one year or longer may be imposed.

8 U.S.C. §1182(a)(2)(A)(i), INA §212(a)(2)(A)(i) is labeled criminal and related grounds and provides that an alien is inadmissible if:

> (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) A crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

8 U.S.C. §1229a(c)(3)(A), 240(c)(2)(A) is labeled removal proceedings and provides for how a judge is to determine if an alien is removable:

> (A) *In General.* – In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

IV. STATEMENT

This case presents two questions: 1) does precedence require that the BIA utilize a categorical or modified categorical approach to determine what constitutes a crime involving moral turpitude and what level of deference should be afforded to the BIA when reviewing such a decision; 2) what facts or evidence can be utilized in making a determination that a crime involving moral turpitude has been

committed thereby precluding an otherwise eligible individual obtaining permanent residence status.

A. Historical Background

This Court has determined that the term crime involving moral turpitude is not unconstitutionally vague. *Jordan v. De George,* 341 U.S. 223 (1951). However, no court or legislature has clearly defined what constitutes a crime involving moral turpitude (CIMT). Instead, on a case-by-case basis, the immigration court has been left to its own devices to determine a CIMT in immigration proceedings. When determining if a crime is a CIMT the BIA has clearly stated that the appropriate review is either a categorical or modified categorical approach. However, circuits are still struggling as to what level of deference should be granted to the BIA as they review these types of cases.

This Court has addressed the methodology utilized to categorize convictions in two landmark cases, *Taylor v. United States,* 495 U.S. 575 (1990) and *Shepard v. United States,* 544 U.S. 13 (2005). In *Taylor,* this Court established a uniform standard for determining whether a prior conviction falls within a category of crimes that can carry an enhanced federal sentence. Thereafter, in *Shepard v. United States,* the Court addressed whether facts contained in the record of conviction were relevant in sentencing enhancement cases. The Court held that the trial court could look at certain records to determine

whether the plea had necessarily rested on the fact identifying the conviction as within the generic definition at issue; however, a trial court is precluded from looking to documents outside the record of conviction.

The basic analysis in *Shepard* was affirmed by the BIA in *Matter of Sejas,* essentially *Sejas* said that the categorical approach requires looking only to the statute to determine if a conviction, as defined by the statute, constitutes a CIMT. *See Padilla v. Gonzales,* 397 F.3d 1016 (7th Cir. 2005). However, if an offense is defined in a divisible statute, one that allows for more than one basis for conviction, then it is permissible for the court to look to particular documents which make up the record of conviction in order to determine which offense lead to conviction; in this situation the "statute of conviction is broader than the generic definition of the crime." *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013, 1020 (9th Cir. 2005). The appropriate documents include the indictment, plea, verdict and sentence. *See Matter of Short,* 19 I&N Dec. 135, 136-137 (BIA 1989), *see also Matter of Sejas,* 24 I&N Dec. 236, 237 (BIA 2007). This particular approach is labeled the modified approach. However, it is well established that in deportation proceedings an immigration judge cannot go behind the judicial record to determine an alien's guilt or innocence of a crime; to do otherwise risks retrying the alien's guilt. *See Matter of McNaughton,* 16 I&N Dec. 569 (BIA 1978); *Matter of Fortis,* 14 I&N Dec. 576 (BIA 1974); *Matter of Sirhan,* 13 I&N Dec. 592 (BIA 1970).

Notwithstanding which approach is used the courts have generally provided *Chevron* deference to the Board's definition of a crime involving moral turpitude and the rational used to come to that determination. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, *Chevron* deference is only required if the statutory interpretation is permissible and reasonable. *See id.* 467 U.S. at 843. And, if an agency's, or as in the instant case, the BIA's, rational is so far removed from established precedent then *Chevron* deference is not required. However, there clearly exists a question among circuits in how to apply deference in determining if the BIA has properly adhered to its own well settled standards. Previous to the instant case the BIA had made it clear that it intended to engage in the categorical and modified categorical analysis for determining all criminal grounds of removability notwithstanding a specific exception carved out in *Matter of Babaiskov*, 24 I&N Dec. 306 (BIA 2007).

B. Factual Background

Ibrahim Ali, a national of Jordan, arrived as a permanent resident with his family on December 26, 1977. On or about March 7, 2001 Ali was placed in removal proceedings as a result of a criminal conviction. (A.R. 853).

On December 19, 2000 Ali was convicted in the United States District Court for the Northern District of Illinois for violating Title 18, United States Code,

§371, which is for conspiracy and was subsequently sentenced to 22 months in prison. (A.R. 53). Immigration and Customs Enforcement (formally Immigration & Naturalization Service) charged Ali with being removable from the United States because of his conviction for conspiracy which constituted a firearms offense and therefore made him removable for having been convicted of a crime involving the purchase, sale or offer for sale of a firearm, thereby subjecting him to removal pursuant to INA §237(a)(2)(C), 8 U.S.C. §1227(a)(2)(C). (A.R. 853-854).

At the removal hearing Ali sought cancellation of removal pursuant to INA §240A(a), 8 U.S.C. §1229a(a), which provides that a permanent resident who has resided in the country for more than seven years may seek relief from removal if he has not been convicted of an aggravated felony. Ali's twenty-five years as a lawful permanent resident qualified him to apply for this particular type of relief. Ali submitted affidavits and other documentation demonstrating that he and his family would experience undue hardship should he be deported to Jordan, a country he had not been to since he was nine years old. In addition to his application for cancellation of removal, Ali's citizen wife filed an I-130 immediate relative petition in order to allow him an opportunity to regain lawful permanent status as an immediate relative of a U.S. citizen.

In November of 2001, three months after filing his cancellation of removal the government alleged an additional ground of removability, aggravated

felony pursuant to INA §237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii), asserting that Ali's conviction constituted illicit trafficking in firearms and was therefore an aggravated felony pursuant to INA §101(a)(43)(C), 8 U.S.C. §1101(a)(43)(C) (A.R. 851). The IJ reviewed briefs on whether Ali's offense constituted an aggravated felony or a crime involving moral turpitude. (A.R. 160-166). Based upon his review the IJ determined that the crime constituted an aggravated felony but was not one involving moral turpitude. For this reason Ali could seek adjustment of status to lawful permanent resident because of his immediate relative status and would not require a waiver pursuant to INA §212(h), 8 U.S.C. §1182(h) despite his criminal conviction.

Ali's wife filed an I-130 immediate relative petition on Ali's behalf in the fall of 2001, which was not approved until the fall of 2002. During this time the IJ continued Ali's case to await the approval of the petition. Additionally, during this period Ali was released from federal prison in Pennsylvania and he returned to Chicago to live with his family; therefore venue changed from the Philadelphia immigration court to the Chicago immigration court.

On March 24, 2005 the newly assigned IJ in Chicago held a master calendar hearing and Ali presented the nature of his case. The IJ set an evidentiary hearing on the adjustment of status for May 24, 2005. (A.R. 98-105). To support his case Ali filed all of the necessary documents for adjustment of status. (A.R. 204-505). At the hearing on March 24,

2005 the Department of Homeland Security (DHS), for the first time, objected to Ali's eligibility to seek adjustment of status. The IJ heard argument from both sides and ultimately, despite the IJ in Pennsylvania deciding otherwise, concluded that Ali's conviction constituted a crime of moral turpitude and as such the petitioner was required to seek a waiver pursuant to INA §212(h). However, since the crime also constituted an aggravated felony, and he was a lawful permanent resident, he was ineligible for such a waiver, and therefore could not seek adjustment of status. The Chicago IJ denied Ali's application for adjustment of status and ordered him removed from the United States. (A.R. 63-73).

Thereafter Ali appealed to the Board of Immigration Appeals (BIA) arguing that the conviction did not involve moral turpitude. The BIA determined on April 3, 2007 that the offense was a crime of moral turpitude and therefore Ali would require a waiver; however, as a lawful permanent resident, convicted of an aggravated felony, he was ineligible for a waiver. The BIA subsequently affirmed the order or removal.

In September 2007, Ali sought a petition of review in the Seventh Circuit. Ali requested that the Seventh Circuit make a determination as to whether a conviction for conspiracy to violate 18 U.S.C. §922(a)(1)(A) and 18 U.S.C. §924(a)(1) constitutes a CIMT. Furthermore, Ali asked the Seventh Circuit if the BIA erred in concluding that a conspiracy to violate 18 U.S.C. §924(a)(1) is a CIMT by relying upon its own precedent which it had previously

overruled; additionally Ali requested a review of the BIA's failure to utilize either a categorical or modified categorical analysis when determining a crime involving moral turpitude.

On April 4, 2008 the Seventh Circuit denied the petition for review and affirmed the BIA's reasoning related to the finding that Ali's offense was a species of fraud and therefore constituted a crime involving moral turpitude. Ali filed a petition for reargument and reargument en banc, but that was also denied.

V. REASONS FOR GRANTING THE PETITION

A. There is conflict among the Circuits regarding how to define a crime involving moral turpitude, whether a categorical or modified categorical.

This Court's review is necessary to clear up a conflict, as well as confusion, among circuits in how to apply deference owed to BIA decisions classifying crimes involving moral turpitude (CIMT). *See Mei v. Ashcroft,* 393 F.3d 737 (7th Cir. 2004) The Seventh Circuit clearly stated in its decision in *Mei* that a split existed among the circuits but that it felt deference is appropriate by upholding the BIA's definition of a CIMT. *See Hashish v. Gonzales,* 442 F.3d 572 (7th Cir. 2006) at 575. Currently, the First, Third, Seventh and Eighth Circuits extend such deference to BIA classifications of a crime as being one "involving moral turpitude", while the Fifth and Ninth Circuits do not.

But although numerous courts give the BIA's definition of a CIMT deference the courts still struggle as to how much deference should be afforded to the BIA's interpretation and analysis of CIMTs. Due to the fact that the BIA has not actually clearly defined a CIMT, but has adopted a criminal law approach, most courts have given the definition *Chevron* deference but are divided over when the BIA has defined something as a CIMT and if that decision requires the same deference. For instance, the Seventh Circuit says it is only necessary to review what crimes the BIA determines falls within a CIMT not the definition itself. *See Mei*, at 739.

In order to determine a CIMT the BIA has clearly adopted a categorical approach and has reaffirmed this on numerous occasions. In *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007) the BIA applied the categorical approach in evaluating whether a particular offense constituted a CIMT. This approach requires looking only to the statute to determine if the conviction, as defined by the statute, falls within the meaning of moral turpitude. In *Matter of Gertsenshtyeyn*, 24 I&N Dec. 111 (BIA 2007) the BIA affirmed that it would apply a categorical or modified categorical approach to all convictions for grounds of removal, including CIMTs. *See Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996) (statutes that criminalize weapons offenses are not a basis for removal unless the record of conviction demonstrates the conviction was for a firearm), *Matter of S-*, 2 I&N Dec. 353, 357-58 (BIA, A.G. 1945) (moral turpitude inheres in the

statute). *Matter of Ghunaim,* 15 I&N Dec. 269 (BIA 1975), *modified on other grounds, Matter of Franklin,* 20 I&N Dec. 867 (BIA 1994); *Matter of S-,* 2 I&N Dec. 559 (C.O., BIA 1946; A.G. 1947).

It is incumbent that a uniform approach be maintained and that, in light of the BIA's clear adoption of the categorical approach, it is incumbent upon courts to continue to give consistent deference to the mechanism that the BIA has chosen to evaluate CIMTs. Therefore it is necessary that this court addresses the type of deference used when reviewing the BIA's analysis of CIMTs.

B. Review is also warranted to clear up any confusion regarding what facts or evidence the Immigration Court can utilize to characterize or classify an offense for the purpose of finding removability.

In addition to the conflict and confusion regarding how deference should be applied to BIA decisions there is a clear conflict as to whether the BIA is even required to utilize the categorical or modified categorical approach to find a CIMT. Significantly the Seventh Circuit's decision in *Mei* found it necessary to utilize a categorical approach in order to determine if the BIA properly determined if the alien's crime involved moral turpitude. *Id.* at 575. Additionally, this approach was adopted to ensure that uniformity would be realized across the circuits. However, in the instant situation both the BIA and the Seventh

Circuit deviated from its own clear application of the categorical approach by looking to the Pre-Sentencing Investigation report (PSI); and the Seventh Circuit justified such an exception by the BIA looking to *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) for support[1].

But reliance on *Babaisakov* is misplaced. The *Babaisakov* decision created a narrow exception to the categorical analysis for aggravated felonies to review offenses that make an alien statutorily eligible for removal but require proof of facts not in the elements of the offense. This exception was carved out for offenses that require proof of loss. In *Babaisakov* the BIA needed to establish that a loss of more than $10,000 occurred; something that is not a statutory element of the offense. The BIA further recognized that facts beyond the elements of the conviction were established by less proof than is required at law. *Id.* at 308-309. However, Congress has clearly mandated that removability be established by clear and convincing evidence. INA 240(c)(3)(A), 8 U.S.C.

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[1] The issue in *Babaisakov* was what scope of the evidence that an Immigration Judge may consider in removal proceedings to determine whether a conviction for an offense involving fraud or deceit was one "in which the loss to the victim or victims exceeds $10,000," as required by §101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(43)(M)(i) (2000). The BIA held that an Immigration Judge is not restricted to "record of conviction" evidence but may consider any evidence admissible in removal proceedings bearing on the loss to the victim.

§1229a(c)(3)(A). In order to reconcile this issue the BIA remanded the *Babaisakov* case for a further hearing so that the immigration judge could "consider any evidence, otherwise admissible in removal proceedings, including witness testimony, bearing on the loss to the victim in an aggravated felony." *Id.* at 321. This allowed the respondent in that case an opportunity to object and offer evidence that may have had a bearing on the criminal case but none in the removal case. *Id.* at 322.

By no means does this limited exception indicate that the BIA has strayed from its general application of the categorical approach, nor should the BIA abandon precedent when it feels fit to do so on a case by case basis. In fact *Babaisakov* reaffirmed the BIA's categorical approach, stating that it accepted that this approach is to be applied with respect to any aspect of a removal charge that depends on a conviction under a criminal statute containing elements that must be shown to establish removability. *Babaisakov* at 317. And courts that choose to follow the narrow exception established in *Babaisakov* must do so only with facts established by clear and convincing evidence. However, facts found in items such as Pre-Sentence Investigatory Reports (PSI) need only be proven by a preponderance of the evidence. *United States v. Haile*, 448 F.3d 971, 988 (7th Cir. 2006), *cert. denied*, 127 S.Ct. 1020 (2007). (Preponderance of the evidence remains a valid basis for determining sentencing facts, even post-*Booker*). Therefore, finding that someone has been convicted of a CIMT based

upon a preponderance of the evidence is problematic and flies directly in the face of Congress' intent that removability must be established by clear and convincing evidence.

In petitioner's situation the Seventh Circuit relied not only on *Babaisakov*, it also looked to 8 U.S.C. §1229a(c)(3)(A) and the First Circuit's decision in *Conteh v. Gonzales,* 461 F.3d 45 (1st Cir. 2006) to support its use of the PSI.[2] 8 U.S.C. §1229a(c)(3)(A) outlines various documents which can be used to establish the existence of a conviction, and although a PSI is not on this list the Seventh Circuit analogizes it to other documents listed and cited *Conteh* for its finding. However, this is a complete mischaracterization as *Conteh* states precisely the opposite of what the Seventh Circuit claimed.

> The government asserts that the PSI report is part of the record of conviction by virtue of the fact that it is a "record prepared . . . under the direction of . . . the court in which the conviction was entered that indicates the existence of a conviction." 8 U.S.C. §1229a(c)(3)(B)(vi). [footnote omitted]
>
> We reject the government's argument: the BIA's consultation of the PSI Report as proof

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[2] The *Conteh* court acknowledged that the INA does not prescribe a detailed methodology for determining whether a predicate offense fits within these definitions and therefore what qualifies as an aggravated felony. *See Conteh*, at 52.

> of the specific facts underlying the petitioner's prior conviction was improper. *See Dickson,* 346 F.3d at 53 (concluding that the BIA may not consider the narrative statement in a PSI Report as evidence of the facts underlying a putative predicate offense) [further citations omitted]. *Conteh,* at 58.

As demonstrated, *Conteh* rejects the notion that §1229a(c)(3)(B) is a basis for using a PSI as evidence to prove the specific facts of a crime. The *Conteh* court found that, other than for its possible use to prove the *existence of* a conviction such a report is simply not a part of the formal record of conviction. *Id.* at 58. In fact, every circuit that has considered the reasoning of the Seventh Circuit has rejected it. *See Dickson v. Ashcroft,* 346 F.3d 44 (2d Cir. 2003), *Hernandez-Martinez v. Ashcroft,* 343 F.3d 1075 (9th Cir. 2003). Even the Seventh Circuit itself recognized that the BIA's new approach was inconsistent with its previous categorical approach and its own deviation of allowing a court or agency to look behind the conviction creates conflict and indicates that previous cases will have to be reviewed for consistency. The court reasons that previous decisions by the Seventh Circuit, *Hashish v. Gonzales,* 442 F.3d 572 (7th Cir. 2006); *Padilla v. Gonzales,* 397 F.3d 1016 (7th Cir. 2005) where the court concluded that immigration officials must stick to the indictment and record of conviction when using an alien's convictions as the basis of removal, must now be revisited. *See Ali v. Mukasey,* 521 F.3d 737 (7th Cir. Apr. 4, 2008). Therefore, confusion and a lack of uniformity clearly exists

regarding what documents can be used to prove removability, and more importantly the appropriate standard that proof must demonstrate.

C. The issue is one of substantial importance and requires uniformity.

This Court's intervention is necessary to ensure uniformity among the courts and provide certainty to aliens facing removal proceedings. Aliens need to know what a crime involving moral turpitude is and how the BIA is going to reach that decision; a CIMT cannot be left to chance or the whim of a particular IJ or the BIA on a case by case basis. This is especially true as aliens accept plea agreements that appear to ensure they continue to qualify for a defense against deportation. Certainty must exist so that aliens may exercise a certain reliance that a particular crime either is or is not one involving moral turpitude, and they need to be able to rely on what documents a court can look to in order to define a crime. An alien should not expect that a court can decide, without precedent that their conviction is a crime involving moral turpitude while another court clearly finds that this is not the case. Additionally, an alien must be assured that removability is premised with evidence on the record by clear and convincing evidence. Absent this Court's intervention defining what constitutes a CIMT will continue to be a guessing game. In *Jordan v. De George* Justice Jackson noted, "How many aliens have been deported who would not have been had some other judge heard their cases, and vice

versa, we may only guess. That is not government by law." *Jordan,* at 239-38.

VI. CONCLUSION

The petition for a writ of certiorari should be granted in order to establish a standard legal approach to removal hearings and ensure that aliens can have a relative sense of certainty as they enter removal proceedings. In this case Ali entered removal proceedings with the understanding that he had committed an aggravated felony, not a crime involving moral turpitude. Based upon his reasonable belief that he had not committed a crime involving moral turpitude Ali believed he qualified to once again adjust to legal permanent residence status as the spouse of a U.S. citizen and continue to live his life in the United States which he has done so since 1977. He clearly relied on this assumption entering his proceedings as well as over a year as his proceedings continued due to the IJ in Philadelphia making a ruling on the record that he was guilty of an aggravated felony, but not a CIMT. If not for the unfortunate circumstance of changing venues Ali would have adjusted status long ago as the IJ in Philadelphia had found him eligible for adjustment. Clearly this is a case of great importance and the issue is equally important to give individuals such as Ali an ability to rely on the law, have confidence that the process is fair regardless of what venue or circuit their case may

arise in; as well as eliminate conflict among the circuits.

Respectfully submitted,

STANLEY J. HORN*
LAUREEN ANDERSON
HORN, KHALAF, ABUZIR,
MITCHELL & SCHMIDT
2 North LaSalle Street
Suite 630
Chicago, IL 60602
312-281-5444

Counsel for Petitioner
Ibrahim Ali

**Counsel of Record*

October, 2008

In the
United States Court of Appeals
for the Seventh Circuit

No. 07-1970

IBRAHIM A. ALI,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals.

ARGUED MARCH 5, 2008 – DECIDED APRIL 4, 2008

Before EASTERBROOK, *Chief Judge*, and MANION and SYKES, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Ibrahim Ali, a citizen of Jordan, lived in the United States for more than 20 years as a permanent resident alien. He might have become a citizen; his wife and children are citizens; but when he chose to remain an alien and commit a federal crime, he put his residence and his family life in jeopardy. His crime is selling firearms, without a license or required paperwork, to people not authorized to own them. The conviction is for conspiracy "to

commit any offense against the United States, or to defraud the United States", in violation of 18 U.S.C. §371. The statutes that the conspirators agreed to violate are 18 U.S.C. §922(a)(1)(A) and §924(a)(1). The immigration judge and Board of Immigration Appeals classified Ali's offense as one "involving moral turpitude", which foreclosed any opportunity for him to seek adjustment of status on the basis of his wife's petition.

Ali concedes that, because his offense is a firearms crime, it is an "aggravated felony" under 8 U.S.C. §1227(a)(2)(A)(iii). That blocks most avenues of discretionary relief. The one that remains open is adjustment of status under 8 U.S.C. §1255(a). Ali is eligible to seek adjustment of status only if he could be readmitted to the United States. His conviction makes him ineligible for admission, but he can seek a waiver of that ineligibility, see 8 U.S.C. §1182(h) – unless his offense is a "crime involving moral turpitude." 8 U.S.C. §1182(a)(2)(A). We are entitled to consider that subject notwithstanding the aggravated felony because the proper classification of an offense is an issue of law. See 8 U.S.C. §1252(a)(2)(D). But "moral turpitude" is a notoriously plastic term – one so ambulatory that some Justices have thought it unconstitutionally vague, see *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (holding the phrase constitutionally adequate, over three dissents). Neither the Criminal Code nor the Immigration and Nationality Act supplies a definition.

When Congress leaves an administrative agency with discretion to resolve a statutory ambiguity, judicial review is deferential. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001). That principle applies to immigration no less than to other subjects. *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). We have several times avoided deciding whether the agency's classification of a crime as one of "moral turpitude" is covered by *Chevron*. See, e.g., *Garcia-Meza v. Mukasey*, No. 07-2215 (7th Cir. Feb. 5, 2008); *Wei Cong Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004). There is little justification for keeping everyone on tenterhooks and requiring counsel to brief this issue over and over again. *Mead* holds that a delegation of authority to an agency by the enactment of a vague statute that the agency must administer confers interpretive latitude on the agency rather than the court (that's the meaning of *Chevron*), provided that the agency uses rulemaking or adjudication to exercise its discretion. "Crime involving moral turpitude" is an open-ended term; the Board and other immigration officials are both required and entitled to flesh out its meaning; and as the Board has done this through formal adjudication the agency is entitled to the respect afforded by the *Chevron* doctrine.

The Board gave two reasons for finding that Ali's crime is one of moral turpitude. One is well-founded in the Board's jurisprudence and thus has all the support that *Chevron* can afford. The other is not –

and, as it was applied in this case by a single member of the Board and not based on a precedential opinion issued by a multi-member panel, it lacks that support.

We start with the weak reason. The Board stated that unlicensed commercial trafficking in firearms is morally reprehensible. That view is incompatible with the Board's own precedents, which distinguish between acts that are seen as ethically wrong without any need for legal prohibition (acts wrong in themselves, or *malum in se*), and those that are ethically neutral and forbidden only by positive enactment (acts wrong because they are so decreed, or *malum prohibitum*). The Board has held that acts that are wrong in themselves, but not those forbidden only by positive enactment, are treated as crimes of moral turpitude. See *Matter of L-V-C-*, 22 I.&N. Dec. 594, 604 (1999); *Matter of Serna*, 20 I.&N. Dec. 579 (1992). Licensing and form-filing requirements are in the category of *malum prohibitum*.

The single member speaking for the Board wrote that firearms licenses are different, because guns "require a license due to their inherent potential risk to the public welfare". That reflects ignorance of this nation's history. Licensing of dealers (and users) of firearms is a recent development; the first version of what is now §922 and §924 was not enacted until 1968; there is nothing inevitable about the current rules. Guns are dangerous, but the choice between licensing (a form of limited control before the fact) and punishment for misuse of firearms is not an

obvious one. Knives and other blade weapons are not licensed; their misuse is controlled through sanctions after the fact, which deter future wrongdoing. There are open questions, reflected in *Parker v. District of Columbia v. Heller*, 478 F.3d 370 (D.C. Cir. 2007), cert. granted under the name *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (argued March 18, 2008), about the extent to which the Constitution's second amendment allows the national government to regulate firearms. One reason why many firearms-control statutes require proof that the accused knew about the law's requirements is precisely that any complex licensing system has unexpected and counterintuitive applications, which people cannot discover by consulting a moral compass. See *Staples v. United States*, 511 U.S. 600 (1994).

The Board's existing precedents link "moral turpitude" to acts wrong in themselves – acts that, as *Matter of Franklin*, 20 I.&N. Dec. 867 (1994), put it, are base or vile, or display indifference to ethical concerns. Doubtless some unlicensed sales of firearms meet that condition. Think of sales to known terrorists or gangsters. But other licensing and documentation offenses pose low risks, see *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492 (7th Cir. 2006), while still others are ambiguous. If all firearms-licensing offenses are to be moved to the "moral turpitude" category, that must be done by the Board as a whole after full deliberation.

The Board was on stronger ground, however, in treating Ali's offense as a species of fraud, which has

long been seen as a crime of moral turpitude. See *Jordan,* 341 U.S. at 227-28, 232; *Palmer v. INS,* 4 F.3d 482, 485 n.6 (7th Cir. 1993); *Matter of Kochlani,* 24 I.&N. Dec. 128, 130-31 (2007) (reaffirming the Board's precedents on this issue). Ali does not deny that, if his conviction is for fraud, then he is ineligible for discretionary relief. But he insists that unlicensed dealing in firearms does not entail fraud. If his conviction were under 18 U.S.C. §924(a)(1)(D), as he supposes, Ali might have a point – *Bryan v. United States,* 524 U.S. 184 (1998), on which the agency's brief relies, has nothing to do with moral turpitude – but the actual offense of conviction is 18 U.S.C. §371. That crime may be committed in either of two ways: conspiracy to commit some other federal crime, or conspiracy to defraud the United States. The IJ and Board concluded that Ali's violation of §371 entailed fraud (implying that the subsection of §924 underlying the crime was §924(a)(1)(A)). And with good reason. The judgment of conviction describes the crime as "[c]onspiracy to defraud the United States." The presentence report adds: "it was further part of the conspiracy that the defendants misrepresented, concealed and hid, and caused to be misrepresented [,] concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy". The presentence report also stated that Ali and his confederates sold the guns to someone who, they believed, would resell them to known thugs (members of the Latin Kings street gang) in exchange for cocaine.

Ali sees the Board's use of the presentence report as his opening. Several opinions of this court state that immigration officials must stick to the indictment and record of conviction when using an alien's convictions as the basis of removal. See, e.g., *Hashish v. Gonzales,* 442 F.3d 572, 575 (7th Cir. 2006); *Padilla v. Gonzales,* 397 F.3d 1016, 1019 (7th Cir. 2005). The presentence report summarizes information from the prosecutor, from witnesses, and from the defendant's own mouth. Ali maintains that its contents must be ignored when classifying an offense for immigration purposes.

Our decisions in *Hashish, Padilla*, and similar cases apply to immigration law the approach that *Taylor v. United States,* 495 U.S. 575 (1990), and *Shepard v. United States,* 544 U.S. 13 (2005), adopt for recidivist enhancements in federal criminal prosecutions. The Supreme Court gave two principal reasons: in *Taylor* it stressed the benefits of simple application, so that sentencing not be burdened by a retrial of the original prosecution, and in *Shepard* it stressed the allocation of tasks between judge and jury under the sixth amendment. The Justices adopted a rule that prevented the sentencing judge in the new case from assuming a role that the Constitution assigns to the jurors in the first case. Neither of these reasons applies to immigration proceedings. They are not criminal prosecutions, so the sixth amendment and the doctrine of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), do not come into play. And how much time the agency wants to devote to the

resolution of particular issues is, we should suppose, a question for the agency itself rather than the judiciary. See *Conteh v. Gonzales,* 461 F.3d 45 (1st Cir. 2006) (adopting for immigration cases what the court called a "modified categorical approach" rather than the rule that *Taylor* and *Shepard* devise for criminal prosecutions). This leaves decisions such as *Hashish* and *Padilla* hanging, for they do not discuss the differences between administrative and criminal proceedings. Meanwhile other panels have felt free to look beyond the charge and record of conviction to classify an offense as one of moral turpitude, see *Wei Cong Mei,* and still other panels have noted the inconsistent treatment within the court. See, e.g., *Abdelqadar v. Gonzales,* 413 F.3d 668, 671-72 (7th Cir. 2005).

Instead of starting with the procedures used in criminal prosecutions, we think it best to recognize that there are at least two distinct questions in immigration proceedings. The first is the fact of the prior conviction, which usually is the only thing that needs to be established for recidivist sentencing in a criminal prosecution. The second is the appropriate classification of that conviction, which may require additional information. The need to decide whether a crime is one of "moral turpitude" does not have a parallel in criminal cases and may require some additional information, since the charging papers that led to the prior conviction are not framed with such classifications in mind (for "moral turpitude" just isn't relevant to the criminal prosecution; it is not

as if "turpitude" were an element of an offense). Other parts of immigration law ask how much the victim lost from a crime (one example is 8 U.S.C. §1101(a)(43)(M)(i)), and again this is not an element of the crime but must be pinned down in the administrative proceeding.

For the first question – of what crime does the alien stand convicted? – the Immigration and Nationality Act supplies a rule.

> In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
>
> (i) An official record of judgment and conviction.
>
> (ii) An official record of plea, verdict, and sentence.
>
> (iii) A docket entry from court records that indicates the existence of the conviction.
>
> (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
>
> (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with

> the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
>
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
>
> (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

8 U.S.C. §1229a(c)(3)(B). This statute is similar to the approach of *Taylor* and *Shepard,* but to the extent of any difference the statute must control. As for the second question -- whether the agency may go beyond the record of conviction to characterize or classify an offense – the Board has decided that additional evidence may be taken by the immigration judge when necessary. *Matter of Babaisakov,* 24 I.&N. Dec. 306 (2007).

Decisions such as *Hashish* and *Padilla* – in and out of this circuit[†] – predate (or do not notice) *Babaisakov* and require reexamination now that the Board has fully developed its own position, for administrative discretion belongs to the agency rather than to the court. See *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). If our opinions had concluded that the immigration laws leave the Board with no course other than the one applied to criminal prosecutions by *Taylor* and *Shepard*, then the Board's view must yield. But that's not what *Hashish*, *Padilla*, and similar decisions say. They just carry over to immigration proceedings an approach familiar to the federal judiciary from criminal prosecutions. Given §1229a(c)(3)(B), which none of our prior opinions mentions, and *Babaisakov*, which is new, we now

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[†] Most of the regional circuits have applied the *Taylor* and *Shepard* approach directly to immigration cases, without remarking the constitutional and statutory differences. See *Singh v. Department of Homeland Security*, 2008 U.S. App. LEXIS 4378 (2d Cir. Feb. 29, 2008); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007); *Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1067 (9th Cir. 2007) (en banc); *Batrez Gradiz v. Gonzales*, 490 F.3d 1206 (10th Cir. 2007); *Vuksanovic v. Attorney General*, 439 F.3d 1308 (11th Cir. 2006). These decisions do not discuss the significance of 8 U.S.C. §1229a(c)(3)(B). The first circuit in *Conteh*, by contrast, adopted a "modified categorical" approach that it understands the Board to prefer. *Conteh* relies substantially on §1229a(c)(3)(B). Ours is the first court of appeals to take account of both §1229a(c)(3)(B) and *Babaisakov*.

conclude that when deciding how to classify convictions under criteria that go beyond the criminal charge – such as the amount of the victim's loss, or whether the crime is one of "moral turpitude", the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction. Because it resolves a disagreement within the circuit, this opinion has been circulated to all active judges under Circuit Rule 40(e). No judge favored a hearing en banc.

Section 1229a(c)(3)(B) does not include presentence reports among the documents that the agency may use to determine what crime Ali committed. See *Conteh,* 461 F.3d at 58-59. That is not, however, how the agency used the report. The judgment of conviction itself contains what is required to that end (the crime is conspiracy to defraud the United States, in violation of §371). The agency used the presentence report to ensure that the judgment was not a mistake (in other words, to ensure that there really *was* deceit, rather than just a conspiracy to violate a record-keeping law) and to make the moral-turpitude classification, a matter that stands apart from the elements of the offense. Ali does not deny that, if the whole administrative record may be consulted, substantial evidence supports the IJ's decision (which the BIA joined) that his crime entailed concealment and deceit. That makes it a "crime involving moral turpitude", and the petition for review is denied.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A35 697 212 – Chicago Date: Apr. 3, 2007

In re: IBRAHAIM ABED HUSSEIN HASAN ALI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven A. Morley, Esquire

ON BEHALF OF DHS: Joseph M. Yeung
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] – Convicted of firearms or destructive device violation

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Adjustment of status

The respondent appeals the Immigration Judge's decision, dated May 24, 2005, which found him removable as charged and ineligible for adjustment of status and a waiver of inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act. The appeal will be dismissed.

The respondent, a native and citizen of Jordan, entered the United States in 1977 as a lawful permanent resident. In 2000, the United States District Court, Northern District of Illinois, convicted him of conspiracy pursuant to 18 U.S.C. § 371, and sentenced him to 3 years' imprisonment (Exhs. 1, 3, 5). The respondent's record of conviction indicates that the respondent conspired to violate 18 U.S.C. §§ 922(a)(1) and 924(a)(1), which involve firearm trafficking. The respondent does not dispute his removability under sections 237(a)(2)(C) and (a)(2)(A)(iii) of the Act as a result of this crime, and he does not appeal the Immigration Judge's finding that he is ineligible for cancellation of removal due to his aggravated felony conviction. However, because the respondent has also applied for adjustment of status under section 254(a) of the Act, he argues on appeal that the Immigration Judge erred in denying such relief due to the respondent's inadmissibility for having committed a crime involving moral turpitude.

Specifically, the Immigration Judge found that the respondent could not be eligible for adjustment of status without obtaining a waiver of his inadmissibility through section 212(h) of the Act. The respondent concedes that, were he inadmissible, he would be ineligible to apply for such a waiver due to his lawful permanent resident status and his removability as an aggravated felon. *See Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997). However, the respondent argues that a section 212(h) waiver is not necessary in his case

because his conviction does not constitute a crime involving moral turpitude.

The conspiracy statute under which the respondent was convicted criminalizes conspiracies "to commit (an) offense or to defraud the United States (emphasis added)." *See* 18 U.S.C. § 371. A conspiracy to commit an offense involves moral turpitude when the underlying substantive offense is a crime involving moral turpitude. *See Matter of Bader*, 17 I&N Dec. 525 (BIA 1980). In the respondent's case, the District Court found the respondent guilty of conspiring to violate both 18 U.S.C. §§ 922 and 924. The unlawful acts set forth in 18 U.S.C. § 922(a)(1) as referenced in the respondent's conviction documents, criminalize, except with the proper licenses, the "importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce." In turn, 18 U.S.C. § 924(a)(1) sets forth the penalties for, *inter alia*, violations of 18 U.S.C. § 922, and states that whoever:

> (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
>
> (B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

> (C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(1); or
>
> (D) willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.

In his decision, the Immigration Judge found the respondent's conviction under 18 U.S.C. § 371 to be a crime involving moral turpitude under both clauses of the statute. Initially, he found that the record of conviction reflects that the respondent conspired to defraud the United States, and, as such, involved moral turpitude, he further found that the respondent's underlying offense of trafficking in firearms, even without an element of fraud, involved moral turpitude.

Moral turpitude is a nebulous concept, which refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995). Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders the crime one of moral turpitude. *See Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). As an initial matter, we disagree with the Immigration Judge's reasoning that the trafficking of firearms is

intrinsically linked with the trafficking of controlled substances, the latter crime of which has been recognized as a crime involving moral turpitude. (I.J. at 8). *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). No evidence exists in the record to presume such conspiratorial intent, and we need not assume as much, because we find that a conspiracy to violate 18 U.S.C. § 922(a)(1), in and of itself, meets the criteria of a crime involving moral turpitude.

We disagree with the respondent's argument that dealing with firearms is merely a *malam prohibitum* crime, rather than a *malam in se* crime involving moral turpitude. Certain commercial trades require a license due to their inherent potential risk to the public welfare, health, and safety, and we include trafficking in firearms within the category. Just as selling legal controlled substances without a license creates a public risk, so does, by its very nature, the illicit trafficking in firearms without a license. The respondent's decision to circumvent the government's need to track the trafficking of weapons is categorically turpitudinous. Moreover, we note that the respondent's acts in furtherance of the conspiracy all involve the preparation and actual unlicensed sale of weapons; as such, we find no error in the Immigration Judge's decision finding that the respondent's conviction constituted a crime involving moral turpitude.

Moreover, we find sufficient evidence to demonstrate that the respondent's conspiracy involved fraud.[1] The Immigration Judge determined that the respondent had conspired to "defraud the United States," under 18 U.S.C. § 371, due to wording in the pre-sentence report that the respondent "misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy" to deal firearms without a license (Exh. 3). The Immigration Judge found that this description adequately evidenced the fact that the respondent was penalized under subsection (A) of 18 U.S.C. § 924(a)(1), which describes false statements and misrepresentations regarding licensing of firearms. The respondent has presented no argument on appeal which would persuade us otherwise.

---

[1] We have consistently held that where fraud is inherent in an offense, it necessarily involves moral turpitude. *See Matter of Goldeshtein*, 20 I&N Dec. 382 (BIA 1991) (a conviction for conspiracy to violate United States currency laws constitutes a crime involving moral turpitude because the offense entailed deliberate deception and impairment of government functions, and, thus, inherently involved fraud); *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980) (passing a worthless check in violation of Arkansas law is a crime involving moral turpitude because an intent to defraud is in ingredient of the crime); *see also Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980) (noting that where fraud is inherent in an offense, it is not necessary that the particular statute include the usual phraseology concerning fraud in order for it to involve moral turpitude).

As such, we agree with the Immigration Judge that the respondent is inadmissible under section 212(a)(2)(A) of the Act, and we therefore find that he would require a waiver of his ground of inadmissibility in conjunction with his application for adjustment of status under section 245(a) of the Act. Inasmuch as the respondent has not demonstrated eligibility for such a waiver, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

IMMIGRATION COURT
55 EAST MONROE STREET, SUITE 1900
CHICAGO, IL 60609

In the matter of:	A35-697-212
ALI IBRAHAIM ABED H. Respondent	IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of oral decision entered on May 24, 2005. This memorandum is solely for the conveniences of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

[ ] The respondent was ordered removed from the United States to_____.
[ ] in absentia on the charges as set out in the notice to appear.

[X] Respondent's application for voluntary departure was denied and respondent was ordered removed to Jordan ~~alternative to _____~~.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of _____ with an alternative order of removal to _____.

[ ] Respondent was advised of the consequences for failure to comply with the Voluntary Departure order and/or re-entry after removal without advanced authorization.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn

[ ] Respondent's application for withholding/deferral of removal under Article 3 of the U.N. Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[X] Respondent's application for cancellation of removal under Section 240A(a) was ~~( ) granted~~ (x) denied ~~( ) withdrawn~~.

[ ] Respondent's application for cancellation of removal under Section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for a waiver under Section 212(h) of the INA was ~~( ) granted~~ (x) denied ~~( ) withdrawn ( ) other~~.

[X] Respondent's application for adjustment of status under Section 245 of the INA was ~~( ) granted~~ (x) denied ~~( ) withdrawn~~. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the immigration Judge's oral decision.

[ ] Proceedings were terminated, without prejudice.

[ ] Proceedings were administratively closed.

[ ] Other: _____.

Date: 5/24/05

Appeal: ~~WAIVED~~
RESERVED (A / D / B) /s/ Carlos Cuevas
APPEAL DUE BY: Carlos Cuevas,
6/23/05 Immigration Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 28, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

IBRAHIM A. ALI,
Petitioner,

No. 07-1970 **v.**

MICHAEL B. MUKASEY,
Attorney General of the
United States,
Respondent.

Petition for Review of
an Order of the Board
of Immigration Appeals.

Order

Petitioner filed a petition for rehearing and rehearing en banc on May 15, 2008. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

No. 08-552

In the Supreme Court of the United States

IBRAHIM A. ALI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
SAUL GREENSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether decisions of the Attorney General and the Board of Immigration Appeals classifying "crime[s] involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I), warrant deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

2. Whether the agency may consider evidence beyond the record of conviction in determining whether an alien was convicted of a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).

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In the Supreme Court of the United States

No. 08-552

IBRAHIM A. ALI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 521 F.3d 737. The opinion of the Board of Immigration Appeals (Pet. App. 13-19) and the order of the immigration judge (Pet. App. 20-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2008. A petition for rehearing was denied on May 28, 2008 (Pet. App. 23). On August 7, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 25, 2008, and the petition was filed on October 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. An alien may be eligible for adjustment of status if he "is admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). An applicant for adjustment of status has the burden of proving that he is admissible. 8 U.S.C. 1229a(c)(2)(A). An alien is inadmissible if he has been convicted of a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).[1]

2. Petitioner is a native and citizen of Jordan who was admitted to the United States as a lawful permanent resident on December 26, 1977. Pet. App. 1; Administrative Record 775, 853 (A.R.). On December 19, 2000, petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 1-2, 14; A.R. 759. Petitioner had conspired to sell firearms without a license in violation of 18 U.S.C. 922(a)(1)(A) and 18 U.S.C. 924(a)(1). Pet. App. 2.

3. On March 13, 2001, the former Immigration and Naturalization Service served petitioner with a Notice to Appear, which charged that petitioner is subject to removal pursuant to 8 U.S.C. 1227(a)(2)(C), as an alien who committed a firearms offense after being admitted. A.R. 853-854. Subsequently, petitioner was

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[1] An alien who is inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) may nevertheless adjust his status if he is granted a waiver of inadmissibility under 8 U.S.C. 1182(h). However, such a waiver is unavailable to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if * * * since the date of such admission the alien has been convicted of an aggravated felony." 8 U.S.C. 1182(h). Petitioner conceded that he had been convicted of an aggravated felony, see Pet. App. 2, so petitioner was not eligible for a waiver of inadmissibility.

also charged with removability pursuant to 8 U.S.C. 1227(a)(2)(A)(iii) and 8 U.S.C. 1101(a)(43)(C), as an alien who has been convicted of an aggravated felony involving firearms trafficking. A.R. 851-852. Petitioner conceded removability on both charges. A.R. 77, 94.

Petitioner then applied for relief from removal, including, as relevant here, adjustment of status under 8 U.S.C. 1255(a). A.R. 72. The immigration judge (IJ) ruled that petitioner's conviction qualified as a crime involving moral turpitude, such that petitioner was inadmissible and therefore ineligible for adjustment of status. A.R. 64-73. The IJ denied petitioner's application and ordered him removed to Jordan. A.R. 72-73.

4. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA or Board). Pet. App. 13-19. On April 3, 2007, the BIA dismissed petitioner's appeal. *Id.* at 19. The BIA found that there was "sufficient evidence to demonstrate that [petitioner's] conspiracy involved fraud" in violation of 18 U.S.C. 371. Pet. App. 18. The BIA noted the IJ's reliance on statements in petitioner's presentence report (PSR) that he "misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy." *Ibid.* Deeming that evidence from the PSR sufficient to demonstrate that petitioner's crime involved moral turpitude, the BIA upheld the IJ's determination that petitioner was inadmissible under 8 U.S.C. 1182(a)(2)(A). Pet. App. 19.

5. Petitioner filed a petition for review with the court of appeals. On April 4, 2008, the court of appeals denied the petition for review. Pet. App. 1-19.

The court first ruled that the BIA's classification of a crime as one involving moral turpitude is entitled

to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), which are applicable in the immigration context under *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999). Pet. App. 3. It reasoned that "'[c]rime involving moral turpitude' is an open-ended term; the Board and other immigration officials are both required and entitled to flesh out its meaning; and as the Board has done this through formal adjudication the agency is entitled to the respect afforded by the *Chevron* doctrine." *Ibid.*

The court of appeals then affirmed the BIA's holding that petitioner's crime involved moral turpitude. The court stated that the BIA had "good reason" to conclude that petitioner's conviction for violating 18 U.S.C. 371 "entailed fraud," and that petitioner did not dispute that fraud crimes necessarily involve moral turpitude. Pet. App. 6. The court observed that "[t]he judgment of conviction describes the crime as [c]onspiracy to defraud the United States." *Ibid.* (second pair of brackets in original); see A.R. 759 (describing the "Nature of Offense" as "Conspiracy to defraud the United States"). The court of appeals then noted that "the [PSR] adds: 'the defendants misrepresented, concealed and hid, and caused to be misrepresented[,] concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy.'" Pet. App. 6 (second pair of brackets in original). The court then observed that "[t]he [PSR] also stated that [petitioner] and his confederates sold the guns to someone who, they believed, would resell them

to known thugs (members of the Latin Kings street gang) in exchange for cocaine." *Ibid.*[2]

The court rejected petitioner's argument that the BIA improperly relied on petitioner's PSR because the PSR is evidence beyond the record of conviction. The court observed that for purposes of proving the *existence* of a criminal conviction, 8 U.S.C. 1229a(c)(3)(B) lists specific documents that may be used. Pet. App. 9-10. However, for purposes of characterizing an offense under the immigration laws, the court noted the BIA's recent decision in *In re Babaisakov*, 24 I. & N. Dec. 306 (2007), which held that an IJ is permitted to consider the PSR along with other evidence to determine whether an alien's commission of bank fraud caused the loss of more than $10,000, thus rendering the bank fraud an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i). The court concluded that *Babaisakov* stood for a more general proposition that the agency may examine evidence "beyond the record of conviction to characterize or classify an offense." Pet. App. 10. The court therefore deferred to the approach in *Babaisakov* under *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), despite the existence of conflicting Seventh Circuit precedent that predated *Babaisakov*. Pet. App. 11 (citing *Hashish* v. *Gonzales*, 442 F.3d 572, 575, cert. denied, 549 U.S. 995 (2006); *Padilla* v. *Gonzales*, 397 F.3d 1016, 1019 (2005)). Accordingly, the court stated:

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[2] The court did not rely on the BIA's alternative holding, that "unlicensed commercial trafficking in firearms is morally reprehensible" and therefore a crime involving moral turpitude, because it concluded that that ground was not supported by BIA precedent. Pet. App. 4.

> Given [8 U.S.C.] 1229a(c)(3)(B), which none of our prior opinions mentions, and *Babaisakov*, which is new, we now conclude that when deciding how to classify convictions under criteria that go beyond the criminal charge—such as the amount of the victim's loss, or whether the crime is one of "moral turpitude", the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.

Pet. App. 11-12.[3]

Applying that analysis to petitioner's case, the court found that the judgment of conviction established that the crime of which petitioner was convicted was conspiracy to defraud the United States. The PSR was used, the court explained, "to ensure that the judgment was not a mistake (in other words, to ensure that there really *was* deceit * * *) and to make the moral-turpitude classification, a matter that stands apart from the elements of the offense." Pet. App. 12. The court of appeals therefore denied the petition for review. *Ibid.*

6. On November 7, 2008, two weeks after petitioner filed his petition for a writ of certiorari, the Attorney General decided *In re Silva-Trevino*, 24 I. & N. Dec. 687.[4] *Silva-Trevino* adopted a uniform standard for classifying crimes involving moral turpitude:

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[3] In light of the prior circuit precedent, the court of appeals pre-circulated its decision to all active circuit judges, pursuant to circuit rules allowing a panel to resolve an inconsistency in circuit law in that manner. Pet. App. 12.

[4] The Attorney General exercised his authority to review a BIA decision. See *Silva-Trevino*, 24 I. & N. Dec. at 687 (citing 8 C.F.R. 1003.1(h)(1)(I)).

> The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying the Act's moral turpitude provisions, and there now exists a patchwork of different approaches across the nation. My review of this case presents an opportunity to establish a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied.

Id. at 688.

As part of this uniform framework, the Attorney General cited the court of appeals' decision in this case and ruled that "when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record." *Silva-Trevino*, 24 I. & N. Dec. at 699; see Pet. App. 8-11. *Silva-Trevino* therefore applied *Babaisakov*'s ruling—that evidence beyond the record of conviction may be considered in cases regarding the amount of loss that qualifies a crime as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i)—to cases classifying crimes involving moral turpitude, just as the court of appeals' decision had done in this case. See Pet. App. 10.[5]

ARGUMENT

Petitioner contends that the court of appeals' decision creates a conflict among the circuits over "how to apply deference owed to BIA decisions classifying crimes involving moral turpitude," Pet. 9, and whether evidence outside the record of conviction may be considered for that purpose, Pet. 11. Although there has been

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[5] Silva-Trevino has moved the Attorney General to reconsider his decision; that motion is pending.

some disagreement among the circuits on these issues, the court of appeals' decision does not warrant this Court's review for two reasons. First, no court of appeals has considered the impact of the Attorney General's decision in *Silva-Trevino*, which was issued less than two months ago and bears on both questions presented. Second, this case would not be a suitable vehicle for deciding those issues in any event, because the court of appeals' conclusion that a fraud offense constitutes a crime involving moral turpitude was both undisputed and compelled by this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), and because the record of conviction in this case establishes that petitioner was convicted of conspiracy to defraud the United States.

1. a. Petitioner correctly notes (Pet. 9-11) that before the Attorney General adopted a uniform framework for defining "crime involving moral turpitude" in *Silva-Trevino*, the circuits were in conflict over whether *Chevron* applied to the agency's decisions that classified a crime as one involving moral turpitude. The Seventh Circuit in this case joined the First, Third, Fourth, and Eighth Circuits, which have applied *Chevron* to such decisions. Pet. App. 3; accord *Cabral* v. *INS*, 15 F.3d 193, 195 (1st Cir. 1994); *Knapik* v. *Ashcroft*, 384 F.3d 84, 87-88 (3d Cir. 2004); *Yousefi* v. *INS*, 260 F.3d 318, 326 (4th Cir. 2001) (per curiam); *Franklin* v. *INS*, 72 F.3d 571, 572 (8th Cir. 1995), cert. denied, 519 U.S. 834 (1996). Similarly, the Second and Fifth Circuits have applied *Chevron* to the agency's determination that a certain crime is one involving moral turpitude, although they have "review[ed] *de novo* whether the elements of a state or federal crime fit the BIA's definition of a [crime involving moral turpitude]." *Smalley* v. *Ash-*

croft, 354 F.3d 332, 336 (5th Cir. 2003); accord *Wala* v. *Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007). Adopting a contrary approach, the Ninth Circuit has not applied *Chevron* at all to the agency's interpretation of "crime involving moral turpitude." *Plasencia-Ayala* v. *Mukasey*, 516 F.3d 738, 743-744 (2008). In addition to noting that the agency does not administer or have expertise in interpreting criminal statutes, the Ninth Circuit also based its approach on the notion that "the BIA has done nothing to particularize the meaning of [crime involving moral turpitude]." *Id.* at 744.

In *Silva-Trevino*, the Attorney General separated the definition of crime involving moral turpitude from the categorical approach's rigid focus on the charging elements of a criminal statute. See *In re Silva-Trevino*, 24 I. & N. Dec. 687, 699 (Att'y Gen. 2008). And Congress has expressly provided that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1). Under *Silva-Trevino*, while an IJ and the BIA will still initially use the categorical approach, they also may determine whether an offense constitutes a crime involving moral turpitude by reference to evidence that is not considered in the categorical approach: Instead of being limited to evidence in the record of conviction, cf. *Shepard* v. *United States*, 544 U.S. 13, 23, 26 (2005), the IJ and the BIA may consider any evidence "if doing so is necessary and appropriate," *Silva-Trevino*, 24 I. & N. Dec. at 699. It is therefore not necessary for the IJ or the BIA to conclude that the elements of a criminal offense categorically establish the crime as one involving moral turpitude in order to

find an alien inadmissible for committing a crime involving moral turpitude.[6]

Silva-Trevino thus undermines the basis for the Ninth Circuit's decision not to apply *Chevron* to agency classifications of crimes involving moral turpitude. That decision was based on the perception that the BIA, in classifying such crimes, had been confined to examining the elements of the offense under criminal statutes, see *Plasencia-Ayala*, 516 F.3d at 744, as the BIA had been applying the categorical approach adopted by the circuit where the case arose, see *Silva-Trevino*, 24 I. & N. Dec. at 693. As explained in *Silva-Trevino*, however, the BIA is not simply identifying the elements of a criminal offense, but is rather articulating and applying its own independent definition of "crime involving moral turpitude" that is not limited to an examination of the elements of a criminal offense.[7] The Ninth Circuit

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[6] *Silva-Trevino* establishes an approach under which the BIA will define "crime involving moral turpitude" through formal adjudication, and as part of that process will examine evidence beyond the record of conviction. *Silva-Trevino* therefore gives content to the term "crime involving moral turpitude" and the statutory and regulatory provisions through which the Attorney General conducts removal proceedings. It therefore warrants deference under *Chevron* and *Aguirre-Aguirre*. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001) ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking and formal adjudication.").

[7] Contrary to the Ninth Circuit's characterization, the BIA was never administering criminal statutes before *Silva-Trevino*. Rather, the agency was defining the term "crime involving moral turpitude" as a matter of federal law under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and under the categorical approach, that definition looked to various provisions of state and federal criminal laws. See *Cabral*, 15 F.3d at 196 n.5 ("Of course, the definition of a [crime involving moral turpitude] * * * is a matter of federal law. We look to state

therefore may very well change course and apply *Chevron* deference to the Attorney General's or the BIA's classifications of crimes involving moral turpitude.[8] In fact, an en banc panel of the Ninth Circuit recently granted the government leave to brief the question whether that court should reconsider its refusal to accord *Chevron* deference to the BIA's decision that a particular crime is one involving moral turpitude. *Marmolejo-Campos* v. *Mukasey*, No. 04-76644 (9th Cir. reargued en banc June 23, 2008). Until the issue is further developed in the lower courts, this Court's intervention would be premature.

b. In any event, the applicability of *Chevron* is irrelevant here, because all circuits agree with the court below that an element of fraud makes an offense inherently one involving moral turpitude. See, *e.g.*, *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007) (en banc) (Reinhardt, J., writing for a majority of the court). Petitioner's judgment of conviction establishes that he was convicted of conspiracy to defraud the United States. Pet. App. 6, 12. The court of appeals

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law only to determine the elements of the offense of conviction.") (citations omitted).

[8] *Silva-Trevino* also undercuts the Ninth Circuit's concern that the agency had not done anything to particularize the definition of "crime involving moral turpitude." See *Plasencia-Ayala*, 516 F.3d at 744; *Silva-Trevino*, 24 I. & N. Dec. at 706 & n.5.

Moreover, some judges on the Ninth Circuit have advocated that the "en banc court" in an appropriate case address the "anomalies" presented by "importing *Taylor*'s criminal sentencing test" into immigration cases. *Kawashima* v. *Mukasey*, 530 F.3d 1111, 1124 (2008) (O'Scannlain, J., specially concurring, joined by Callahan, J.), petition for rehearing en banc pending, No. 04-74313 (filed Sept. 15, 2008); see *id.* at 1122-1123 (quoting the court of appeals' decision in this case); Pet. App. 7-11.

therefore properly concluded that the crime at issue in this case—a crime involving fraud or deceit—constitutes a crime involving moral turpitude. *Id.* at 5-6. That result was compelled by this Court's decision in *De George*. See 341 U.S. at 232. Indeed, petitioner has not disputed that a fraud offense qualifies as a crime involving moral turpitude. See Pet. App. 6. Issues of *Chevron* deference are therefore irrelevant to the question whether petitioner's crime involved moral turpitude and therefore rendered him ineligible for discretionary relief.

2. Petitioner also contends (Pet. 12-16) that the court of appeals erred in holding that the IJ and the BIA could consider evidence beyond the record of conviction in classifying crimes involving moral turpitude. See Pet. App. 10-12. Although other courts of appeals have previously reached the opposite conclusion, see generally *Hashish* v. *Gonzales*, 442 F.3d 572, 575-576 (7th Cir.), cert. denied, 549 U.S. 995 (2006), that issue likewise does not warrant review at the present time.[9]

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[9] Some courts of appeals have also held that an IJ may not consider evidence beyond the record of conviction in determining whether an alien's prior criminal conviction qualifies as an aggravated felony, for which the alien may be removed from the United States under 8 U.S.C. 1227(a)(2)(A)(iii). See, *e.g.*, *Gertsenshteyn* v. *United States Dep't of Justice*, 549 F.3d 137, 146 (2d Cir. 2008); *Kawashima*, 530 F.3d at 1118. But see, *e.g.*, *Nijhawan* v. *Attorney Gen. of the United States*, 523 F.3d 387, 392-399 (3d Cir. 2008), petition for cert. pending, No. 08-495 (filed Oct. 14, 2008). The Second Circuit has acknowledged that its approach in *Gertsenshteyn* "is arguably in tension with" the Seventh Circuit's decision in this case. *Gertsenshteyn*, 544 F.3d at 146 n.9. But as the court explained, there is no square conflict because the two cases involve differently worded statutory provisions. *Ibid.* (The classification of petitioner's offense as an aggravated felony was not at issue in this case, as petitioner conceded removability on that basis.) In any event, neither

a. Until recently, the BIA had been applying a categorical approach to classifying a crime as one involving moral turpitude, "in accordance with the law of the circuit in which an alien's case [arose]." *Silva-Trevino*, 24 I. & N. Dec. at 693. And before the court of appeals' decision here, each circuit to consider the issue had used the categorical approach adopted for criminal sentencing to determine whether a particular crime was one involving moral turpitude. See *Hashish*, 442 F.3d at 575-576. Under that categorical approach, courts generally could only consider evidence such as "the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the plea transcript." *Silva-Trevino*, 24 I. & N. Dec. at 699; see *Shepard*, 544 U.S. at 23, 26; *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990); see also *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 187 (2007) (explaining lower courts' use of the term "modified categorical approach"). But the Attorney General has since determined that the term "crime involving moral turpitude" can include crimes whose charging elements do not categorically involve moral turpitude, and that the IJ and the BIA therefore may consider evidence beyond the record of conviction. *Silva-Trevino*, 24 I. & N. Dec. at 699. When a court of appeals construes an ambiguous statutory phrase and the responsible agency subsequently interprets that phrase in a manner "otherwise entitled to *Chevron* deference," the agency's interpretation is entitled to such

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the Second Circuit nor the Ninth Circuit has yet had the opportunity to reconsider its approach in light of the BIA's decision in *Babaisakov*, which was later approved in the Attorney General's opinion in *Silva-Trevino*, and which made clear that an IJ in certain circumstances may look beyond the record of conviction to classify an alien's prior offense as an aggravated felony.

deference notwithstanding a prior court of appeals decision to the contrary. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) Because no court of appeals has yet considered the Attorney General's recent decision in *Silva-Trevino*, this Court's review is unwarranted on the question whether classification of a crime as one involving moral turpitude may be based on evidence that could not be considered under the categorical approach used for criminal sentencing.

b. Even if that issue otherwise warranted review, however, this case would not be an appropriate vehicle for considering it. The court of appeals' decision was correct even under the categorical approach, because it was unnecessary to refer to petitioner's PSR. As the court of appeals explained (Pet. App. 6, 12), the judgment of conviction described petitioner's crime as "[c]onspiracy to defraud the United States," see A.R. 759, and the PSR simply confirms what the judgment states. Because petitioner does not dispute that the judgment of conviction can furnish a proper foundation for determining whether a crime is one involving moral turpitude, there is no occasion here to decide whether such a determination can be based on evidence that cannot be considered under the categorical approach used for criminal sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
SAUL GREENSTEIN
Attorneys

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